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Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	85591335
LAW OFFICE ASSIGNED	LAW OFFICE 110
MARK SECTION	
MARK	http://tmng-al.uspto.gov/resting2/api/img/85591335/large
LITERAL ELEMENT	CHURCHKEY
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font style, size or color.
ARGUMENT(S)	
Please see the actual argument text attached within the Evidence section.	
EVIDENCE SECTION	
EVIDENCE FILE NAME(S)	
ORIGINAL PDF FILE	evi_7116323425-20161020182654577261_._Response_to_Office_Action_10-20-16_Final.pdf
CONVERTED PDF FILE(S) (13 pages)	\\TICRS\EXPORT17\IMAGEOUT17\855\913\85591335\xml1\RFR0002.JPG
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	\\TICRS\EXPORT17\IMAGEOUT17\855\913\85591335\xml1\RFR0004.JPG
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	\\TICRS\EXPORT17\IMAGEOUT17\855\913\85591335\xml1\RFR0014.JPG
DESCRIPTION OF EVIDENCE FILE	Argument text and exhibits
SIGNATURE SECTION	
RESPONSE SIGNATURE	/Michael J. Chamowitz/

SIGNATORY'S NAME	Michael J. Chamowitz
SIGNATORY'S POSITION	Attorney of record, Virginia bar member
SIGNATORY'S PHONE NUMBER	703-548-0110
DATE SIGNED	10/20/2016
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Thu Oct 20 18:32:19 EDT 2016
TEAS STAMP	USPTO/RFR-XX.XXX.XXX.XX-2 0161020183219155092-85591 335-570ae9bec415814816878 677fa8b5f3445b46e613ffdc0 7f2e82378a91aea41a2-N/A-N /A-20161020182654577261

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OMB No. 0651-0050 (Exp 07/31/2017)

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. **85591335** CHURCHKEY(Standard Characters, see http://tmng-al.uspto.gov/resting2/api/img/85591335/large) has been amended as follows:

ARGUMENT(S)
In response to the substantive refusal(s), please note the following:

Please see the actual argument text attached within the Evidence section.

EVIDENCE
Evidence in the nature of Argument text and exhibits has been attached.
Original PDF file:
evi_7116323425-20161020182654577261_._Response_to_Office_Action_10-20-16_Final.pdf
Converted PDF file(s) (13 pages)
Evidence-1
Evidence-2
Evidence-3
Evidence-4
Evidence-5
Evidence-6
Evidence-7
Evidence-8
Evidence-9
Evidence-10
Evidence-11
Evidence-12
Evidence-13

SIGNATURE(S)
Request for Reconsideration Signature
Signature: /Michael J. Chamowitz/ Date: 10/20/2016

Signatory's Name: Michael J. Chamowitz
Signatory's Position: Attorney of record, Virginia bar member

Signatory's Phone Number: 703-548-0110

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the owner's/holder's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the owner/holder in this matter: (1) the owner/holder has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the owner/holder has filed a power of attorney appointing him/her in this matter; or (4) the owner's/holder's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 85591335
Internet Transmission Date: Thu Oct 20 18:32:19 EDT 2016
TEAS Stamp: USPTO/RFR-XX.XXX.XXX.XX-2016102018321915
5092-85591335-570ae9bec415814816878677fa
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N/A-N/A-20161020182654577261

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

October 20, 2016

Shaunia P. Carlyle
Trademark Examining Attorney
Law Office 110
United States Patent and Trademark Office

Re:	Serial No.:	85591335
	Mark:	CHURCHKEY
	Applicant:	Neighborhood Restaurant Group VII, LLC
	Office Action Of:	April 20, 2016

APPLICANT'S REQUEST FOR RECONSIDERATION

The following is the response of the Applicant, Neighborhood Restaurant Group VII, LLC, by Counsel, to the Final Office Action issued electronically on April 20, 2016, by Examining Attorney Shaunia P. Carlyle.

LIKELIHOOD OF CONFUSION REFUSAL

The Examining Attorney has refused registration of the proposed mark pursuant to Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the grounds that the mark is likely to be confused with the mark in U.S. Registration No. 4180284. For the following reasons, the Applicant respectfully disagrees with the findings and requests that the Examining Attorney reconsider the final refusal and allow registration of the Applicant's mark.

It is without dispute from the Applicant that Applicant's and Registrant's mark are similar. Applicant contends that it is not similarity that is at issue, but whether or not the standard of "something more" has been met to establish likelihood of confusion as set forth in the precedent controlling this matter as decided in *In re Coors Brewing Co.*, 343 F.3d 1340, 1345, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)(no likelihood of confusion between applicant's BLUE MOON and design for beer and the registered mark BLUE MOON and design for

restaurant services). Additionally, the T.M.E.P. in § 1207.01(a)(ii)(A) gives direction regarding likelihood of confusion specifically in matters regarding "food and beverage products versus restaurant services" by primarily relying upon *In re Coors Brewing Co.*

The U.S. Court of Appeals for the Federal Circuit opined *In re Coors Brewing Co.* that there are far more restaurants than brewpubs, microbrewers, and regional specialty breweries in the United States and that, while there was evidence that some restaurants did sell private label beer, that evidence did not indicate that "there is substantial overlap between restaurant services and beer with respect to source, but rather that the degree of overlap between the sources of restaurant services and the sources of beer is de minimus."

In the present matter, the Examining Attorney contends that Applicant's restaurant and bar prides itself on its beer selection. Applicant agrees with this statement, but notes that it provides a full range of bar and restaurant services in addition to its expansive beer program. However, Applicant does not sell or manufacture private label or house beer. Applicant is not a brewpub or a brewery, and sells other manufacturer's beer through its restaurant and bar services. While *In re Coors Brewing Co.* leaves open the possibility that marks related to the selling of private label beer could potentially conflict with beer marks, generally, Applicant neither manufacturers or sells private label beer, nor (and more importantly) does its application seek protection in regards to beer, brewpubs, beer brewing or any other activity that would result in private label beer.

The Examining Attorney attempts to draw a connection between Applicant's restaurant and bars services to private label beer through Applicant's use of the term DRAUGHT. "Draught," as defined in the Examining Attorney's office action, is a beverage that is stored in bulk. Similarly, it is defined as a beverage not sold in a bottle or a can. See Exhibit 1. It is a

colloquial term used universally in bars and restaurants to differentiate canned and bottled beverages from those stored or poured from a tap, keg, or draft. The term implies nothing as to the source or origin of the beverage and only refers to bulk storage. Such storage thus results in restaurants and bar serving of the beverage in a glass, cup or a myriad of other presentations other than the manufacturer's bottles or cans. In a restaurant context, a draft versus non-draft or bottled beer would be no different than making the differentiation between wine being served in a glass, carafe, or bottle and liquor being purchased in a shot glass, tumbler, snifter, highball, or by the bottle. The most important distinction is that neither the storage nor presentation of the beverage implies or purports to represent the source of origin or associate any terms regarding beverage storage as exclusive to a particular manufacturer of the beverage.

As such, Applicant does not believe it is reasonable to conclude that either restaurant or beer consumers confuse the term draught or draft as having any implication as to the source of the beverage. Concurrently, both sets of consumers would not conclude that drafts sold by a certain bar or restaurant implies that such drafts originate in the same bar. Applicant owns and operates Churchkey and its sister and complimentary restaurant Birch & Barley in the same building, together occupying the first and second floors of 1337 14th St NW, Washington, DC 20005. See Exhibit 2. Applicant is the owner of the registered trademark BIRCH & BARLEY (Registration No. 4246064). Churchkey and Birch & Barley share the same kitchen as well as the same cask beer lines that service bars on each floor. The correct interpretation of the Examining Attorney's reference that an online review of Birch & Barley in which the reviewer mentions having Churchkey drafts is that the reviewer is expressing that the beers sold on the Churchkey level are also available on the Birch & Barley level. He does not imply, nor do other

customers infer, that beverage products provided and sold by Churchkey in its restaurant and bar capacity are produced or manufactured by Applicant.

In re Coors Brewing Co. considered likelihood of confusion between a registered mark for restaurant services and an applicant's mark for beer in a situation almost completely analogous to the current matter. While finding the likelihood of confusion to be de minimus, the Court of Appeals, *arguendo*, reasoned that "if the registrant's mark had been for a brewpub or for restaurant services ***and*** beer (emphasis added) …in that case, the goods and services associated with the two marks would clearly be related and the case for a likelihood of confusion therefore much stronger." In overturning the Board's ruling, the Court of Appeals posited that the Board erred by concluding likelihood of confusion "even though there was no evidence that the [Registrant] brewed or served its own beer" and that the "Board's conclusion that restaurant services and beer are related is based on the fact that a tiny percentage of all restaurants also serve as a source of beer, which is a very weak evidentiary bases for a finding of relatedness." In the present matter, there is no evidence that Applicant's bar and restaurant serves as a source or manufacturer of beer and there is no evidence that Applicant brews or serves its own beers.

In response to Applicant's description of Registrant's goods in its prior response to an earlier office action, the Examining Attorney states that "with respect to applicant's and registrant's good and/or services, the question of likelihood of confusion is determined based on the description of the goods and/or services stated in the application and registration at issue, not on extrinsic evidence of actual use." Applicant points out that its application is limited to services contained only in International Class 043 relating to restaurant, bar, and similar services. No claim is made to "Beer", "Brewpub," any class of goods claimed by Registrant, anything to do with beer brewing or production, nor any goods or services contained in International Class

032. A comparison of the application and registration coupled with the precedent set forth *In re Coors Brewing Co.* should lend itself to a determination that Applicant's mark be allowed to proceed to registration.

The Examining Attorney, in particular, points to The Wharf Rat restaurant in Baltimore, Md. as serving a beer named Wharf Rat Red as evidence of instances where in addition to food services the restaurants also serve beer with the same name as the restaurant. The Court of Appeals, in summarizing Coors Brewing Company's application history prior to its appeal, noted that "in support of that finding [of close relatedness], the examining attorney cited evidence that brewpubs, which brew and serve their own beer, often provide restaurant services, and that some restaurants serve their own private label beer" and that the "examining attorney also cited third-party registration of marks for brewpub restaurants and marks for beer and restaurants services." As shown in that case, such correlations are not sufficient to sustain a likelihood of confusion determination. Applicant again avers that it is not a brewpub, does not make beer, and does not seek trademark registration for either.

The Jacob's requirement that "something more" be demonstrated in order to conclude that beverage and restaurant marks are confusingly similar is not present in the Final Office Action to a degree that meets or exceeds the standards set in the precedential matter of *In re Coors Brewing*. No sufficient evidence of relatedness is given to support the assertion that the respective services of the Applicant are related in some manner to give rise to the mistaken belief that the goods and/or services emanate from the same source as Registrant, or vice-versa. The marks, as described in the application or registration and viewed with the relevant *DuPont* factors in their entirety, coupled with evidence from the marketplace, are insufficiently similar to support a holding that the marks cannot be concurrently registered. For these reasons, Applicant

respectfully requests that the Examining Attorney reconsider the statutory refusal and allow Applicant's mark to proceed to publication.

The Applicant has responded to all issues raised in the Final Office Action. If any further information or response is required, please contact Applicant's attorney. The attorney may be reached by telephone at (703) 548-0110 or by email at mchamowitz@chamlaw.com.

Exhibit List

Exhibit 1 - Definitions of DRAUGHT and DRAFT

Exhibit 2 - Diagrams from Applicant's websites showing Birch & Barley and Churchkey at same address

draught

[draft, drahft]

Word Origin
See more synonyms on Thesaurus.com (http://www.thesaurus.com/browse/draught)

noun

1. **draughts,** (*used with a singular verb*) *British.* the game of checkers.

2. *Chiefly British.* draft (http://www.dictionary.com/browse/draft) (defs 1, 3–10, 18–25, 38).

verb (used with object)

3. *Chiefly British.* draft (http://www.dictionary.com/browse/draft) (defs 28–32).

verb (used without object)

4. *Chiefly British.* draft (http://www.dictionary.com/browse/draft) (def 33).

adjective

5. *Chiefly British.* draft (http://www.dictionary.com/browse/draft) (defs 35–37).

Origin of draught

Pokémon Words (http://blog.dictionary.com/catch-the-real-words-in-this-pokemon-quiz/)

EXHIBIT 1

Middle English
(http://www.dictionary.com/browse/middle-english)

1150-1200

1150-1200; Middle English *draht* (cognate with Dutch *dracht,* German *Tracht,* Old Norse *drāttr*); akin to Old English *dragan* to draw (http://www.dictionary.com/browse/draw), *drōht* a pull (at the oars)

Related forms

draughter, noun

underdraught, noun

Can be confused

draft (http://www.dictionary.com/browse/draft), **draught,** drought (http://www.dictionary.com/browse/drought) (see pronunciation note at the current entry)

Pronunciation note

Draught is a variant spelling of *draft*and is normally pronounced the same way, as [draft] (Show IPA) or [drahft] or with a vowel somewhere between [a] and [ah] . A pronunciation

Pokémon Words (http://blog.dictionary.com/catch-the-real-words-in-this-pokemon-quiz/)

[drawt] is sometimes heard for draught, perhaps because *-aught*is frequently pronounced [-awt] elsewhere, as in *caught*and *taught.*

draft

[draft, drahft]

noun

1. a drawing, sketch, or design.
2. a first or preliminary form of any writing, subject to revision, copying, etc.
3. act of drawing; delineation.
4. a current of air in any enclosed space, especially in a room, chimney, or stove.
5. a current of air moving in an upward or downward direction.
6. a device for regulating the current of air in a stove, fireplace, etc.
7. an act of drawing or pulling loads.

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verb (used with object)

28. to draw the outlines or plan of; sketch.
29. to draw up in written form; compose.
30. to draw or pull.
31. to take or select by draft, especially for military service.
32. *Masonry.* to cut a draft on.

Pokémon Words (http://blog.dictionary.com/catch-the-real-words-in-this-pokemon-quiz/)

verb (used without object)

33. to do mechanical drawing; work as a draftsman (http://www.dictionary.com/browse/draftsman).

34. (in an automobile race) to drive or ride close behind another car so as to benefit from the reduction in air pressure created behind the car ahead.

adjective

35. used or suited for drawing loads:
    a draft horse.

36. drawn or available to be drawn from a cask rather than served from a sealed bottle:
    draft ale.

37. being a tentative or preliminary outline, version, design, or sketch.

Idioms

38. **on draft,** available to be drawn from a cask rather than from a sealed bottle:
    imported beer on draft.

Also, *especially British,* **draught** (for defs 1, 3–10, 18–25, 28–33, 35–38)

Origin

later spelling of draught (http://www.dictionary.com/browse/draught) (since 16th century)

Related forms

draftable, adjective

drafter, noun

Pokémon Words (http://blog.dictionary.com/catch-the-real-words-in-this-pokemon-quiz/)

antidraft, adjective

predraft, noun, verb (used with object)

redraft, verb (used with object)

Can be confused

draft, draught (http://www.dictionary.com/browse/draught).

Dictionary.com Unabridged
Based on the Random House Dictionary, © Random House, Inc. 2016.
Cite This Source

Examples from the Web for draught

Historical Examples

Billy said, smiling at Susan, as he emptied his cup at a *draught*.

Saturday's Child (http://www.gutenberg.org/files/4687/4687-h/4687-h.htm)
Kathleen Norris

There is no horn you can hand me that I cannot empty at a *draught*.

The Children of Odin (http://www.gutenberg.org/files/24737/24737-h/24737-h.htm)
Padraic Colum

After this the young man appeared from time to time, craving a *draught* of wisdom at the fountain-head.

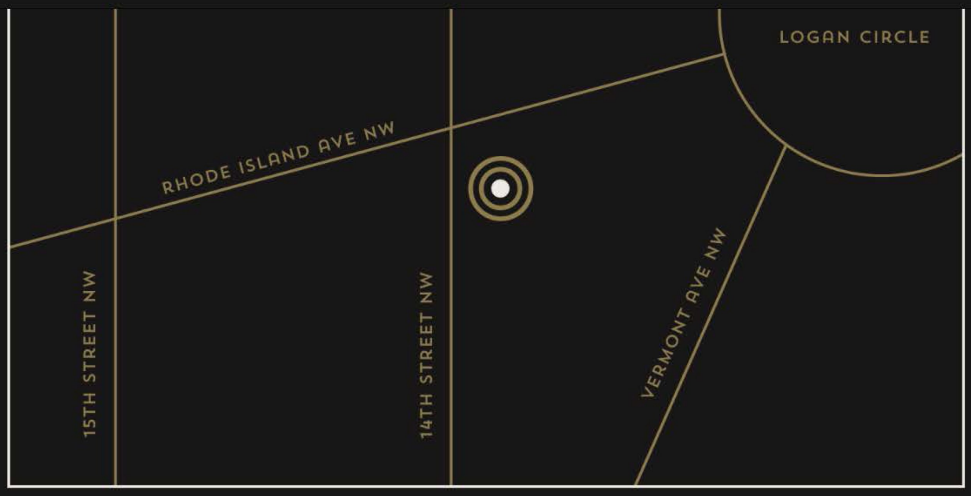
Mrs. Thompson (http://www.gutenberg.org/files/39515/39515-h/39515-h.htm)
William Babington Maxwell

British Dictionary definitions for draught

Pokémon Words (http://blog.dictionary.com/catch-the-real-words-in-this-pokemon-quiz/)

BIRCH & BARLEY
RESERVATIONS / MENUS / HOURS / GIFT CARDS
LOGAN CIRCLE
RHODE ISLAND AVE NW
15TH STREET NW
14TH STREET NW
VERMONT AVE NW
BIRCH & BARLEY
1337 14TH STREET NW WASHINGTON DC 20005 / 202 567 2576
CONTACT US / PRIVATE DINING INQUIRIES / MEDIA INQUIRIES / GIFT CARDS

EXHIBIT 2



CHURCHKEY

★ 1337 14TH STREET NW WASHINGTON DC 20005 ★